No. 85-1029

Supreme Court, U.S.
FILED
JAN 18 1986
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

October Term, 1985

IRVING STARKMAN, M.D., Trustee of the Irving Starkman, M.D., S.C., Defined Benefit Pension Fund and Trust,

Petitioner,

v.

MARATHON OIL COMPANY, H.D. HOOPMAN, C.H. BARRE, V.G. BEGHINI, J.H. HERRING, and W.E. SWALES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Counterstatement of the Questions Presented

1. Whether, in connection with a tender offer, and in light of this Court's decision in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976), information respecting the parties to, and terms of, negotiations concerning a possible merger of a publicly-held corporation is "material" for purposes of the federal securities laws, unless and until an agreement in principle for the merger has been reached?

2. Whether, in the same circumstances, a corporation, which was the target of a tender offer and which, pursuant to a specific Instruction of the SEC, disclosed that it was considering a number of alternatives to the tender offer, including a merger, but did not disclose the participants in, or terms of, negotiations concerning such a merger until an agreement in principle had been reached, violated the federal securities laws by the disclosures it made?

3. Were the disclosures made by Respondents adequate to inform the public and its shareholders of all facts required to be disclosed by the federal securities laws?

Statement of the Parties to this Proceeding Pursuant to Rule 28.1 of this Court

Respondent Marathon Oil Company is now a wholly-owned subsidiary of United States Steel Corporation, and portions of its business are operated as separate, wholly-owned subsidiaries of United States Steel Corporation. In addition to its wholly-owned subsidiaries, Marathon Oil Company is affiliated with the following entities:

Arctic LNG Transportation Company
Badger Pipe Line Company
City Point Oil Terminal, Inc.
CLAM Petroleum Company
Cook Inlet Pipe Line Company
Deutsche Transalpine Olleitung GmbH
Explorer Pipeline Company
Gravcap, Inc.
Green Bay Terminal Corporation
Kenai LNG Corporation
LOCAP, Inc.
LOOP Inc.
Oasis Oil Company of Libya, Inc.
Oil Insurance Limited
Petroleum Terminals, Inc.
Pilot Oil Corporation
Platte Pipe Line Company
Polar LNG Shipping Corporation
Russell Stewart Oil Co.
Societa Italiana Per L'Oleodotto Transalpino, S.p.A.
Transalpine Finance Holdings S.A.
Transalpine Olleitung Osterreich GmbH
West Shore Pipe Line Company
Wolverine Pipe Line Company

In addition to subsidiaries which are wholly-owned, United States Steel Corporation is affiliated with the following entities:

Athlone Prospecting & Development Corporation, Ltd.
First National Bank (Albion, Pa.)

Companhia Meridional de Mineracao
Brazaco-Mapri Industries Metalurgicas S.A.
ITW-Mapri (51% owned by Brazaco-Mapri)
Mecania Walsywa, Ltda.
Companhia Siderurgica Paulista "Cosipa"
Merinds Mineracao
Mineracao Buritirama Ltda.
Mineracao Carajas, Ltda.
Mineracao Maraba, Ltda.
Mineracao Xingu, Ltda.
Termerid Mineracao, SA
Torremco Soc. Min. E. Com. Ltda.
Deepsea Ventures, Inc.
Ocean Mining Associates
FHS Stahlverformung GmbH
FHS Automotive Parts Manufacturing Ltd.
Industria de Tubos y Perfiles, S.A. (Intuperas)
Minerales Ordaz C.A.
Les Entreprises du Lac Lucault Inc.
Sidbec-Normines, Inc.
U.S. Steel France
Zaerust Chrome Mines, Limited
Northern Tier Pipeline Co.
USS MaxTech Company, Inc.
USS MaxTech Company, Ltd.
USS MaxTex Company (Japan), Ltd.
USS Technology (Japan), Ltd.
ACE Holdings, Ltd.
Adela Investment Company, S.A.
Altos Hornos de Viscaya, S.A. (AHV)
Associated Ore & Metal Corporation, Ltd.
Avsteel SWA, Ltd.
Blue Grass Phosphate Company
Chrome Deposit Corp. (Court Holdings J.V.)
Jupiter Mining and Prospecting Co. (Pty.) Ltd.
Kappa Mining & Prospecting Co., Ltd.
La Pointe Iron Company
Navios Corporation

Navios Ship Management Services, Inc.
Oresteel Investments (Proprietary), Ltd.
P.T. Pacific Wikkel Indonesia
Sigma Mining & Prospecting Co. (Pty.) Ltd.
Societe Des Mines De Fer De Guinea Pour L'Exploitation Des Monts Nimba (Mifergui Nimba)
Tilden Iron Mining Company
West Union Canal Company, The
Bartow Chemical Products
Century III Associates
Fort Meade Chemical Products
Double Eagle Steel Coating Co.
Live Oak Uranium Operations
Rockland Joint Venture
RMI Company
Tenneco/USS Chemicals Joint Venture

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§ 23(a)(1), 15 U.S.C. § 78w(a)(1) 2A

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IN THE

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IRVING STARKMAN, M.D., Trustee of the Irving Starkman, M.D., S.C., Defined Benefit Pension Fund and Trust,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The Opinion of the Court of Appeals for the Sixth Circuit, dated September 13, 1985, is reported at 772 F.2d 231. A copy is included in the Appendix to the Petition. The opinion of the District Court for the Southern District of Ohio is unreported, and a copy is included in the Appendix to the Petition.

Statutes and Regulations Involved

The following statutes and regulations are cited in this Brief and reproduced in the Appendix:

Securities Exchange Act of 1934:

§ 10(b), 15 U.S.C. § 78j(b) 1A
§ 14(d)(4), 15 U.S.C. § 78n(d)(4) 1A
§ 14(e), 15 U.S.C. § 78n(e) 2A
§ 23(a), 15 U.S.C. § 78w(a) 2A

Rules and Regulations of the Securities and Exchange Commission:

Rule 10b-5, 17 C.F.R. § 240.10b-5 3A
Rule 14d-9, 17 C.F.R. § 240.14d-9 4A
Rule 14e-2, 17 C.F.R. § 240.14e-2 8A
Schedule 14D-9, 17 C.F.R. § 240.14d-101 9A

I.

Statement

A. The Transaction At Issue

Petitioner purchased 50 shares of the common stock of Respondent Marathon Oil Company ("Marathon" or the "Company")[1] on the New York Stock Exchange on January 14, 1980. The average trading price of Marathon stock on that date was $49.125 per share.

On October 30, 1981, Mobil Corporation ("Mobil") announced a tender offer for 40 million shares of Marathon

1. The individual respondents were officers and directors of Marathon at the time of the transactions at issue in this case. The seven other directors of Marathon at that time were not joined as defendants.

stock (approximately 68% of the shares outstanding) at $85 per share.

The following day, the Marathon Board of Directors met to consider the Mobil offer. After receiving advice from management, outside legal counsel, and Marathon's financial advisor, The First Boston Corporation ("First Boston"), the Board unanimously (with one director absent) determined that Mobil's tender offer was "grossly inadequate" and recommended that the shareholders reject that offer. The Board also proposed a series of resolutions, described below, in furtherance of its opposition to Mobil's offer.

1. *Communications From Marathon To Its Shareholders*

On November 2, 1981, Marathon filed with the Securities and Exchange Commission ("SEC") its Schedule 14D-9 responding to Mobil's tender offer. Attached thereto were copies of the letter sent by the Company to its shareholders on November 2, 1981, its Press Release of the same date, and First Boston's written opinion dated October 31, 1981 stating its conclusion that Mobil's offer was "grossly inadequate from a financial point of view." The Schedule 14D-9 was also mailed to Marathon's shareholders. During the period of November 2-18, 1981, Marathon's Press Releases, published advertisements, and communications to shareholders were filed with the SEC as exhibits to Amendments 1-10 of Marathon's Schedule 14D-9.[2] Through those communications, Marathon's shareholders were informed of Marathon's unwavering opposition to the Mobil offer and of the fact that Marathon was actively pursuing alternatives to that transaction.

2. Copies of Marathon's Schedule 14D-9 and Amendments 1-10 thereto were filed with the District Court as Exhibits to the Affidavit of G. R. Jetton in Support of Defendants' Motion for Summary Judgment. (R. 66). That motion and its attachments were also included in the Joint Appendix filed in the Sixth Circuit.

In its Schedule 14D-9, Marathon informed its shareholders:

> (1) That the Board had unanimously (with one director absent) determined that Mobil's offer of $85 per share for 40 million shares was "grossly inadequate" and recommended that shareholders reject the Mobil offer (Item 4(a));
>
> (2) That the Board's conclusion and recommendations were based, *inter alia*, upon First Boston's written opinion that Mobil's offer was "grossly inadequate from a financial point of view" (*id.*, Item 4(b)(i); Ex. 4);
>
> (3) That the Board had authorized the filing of litigation to resolve the "serious antitrust and other legal questions" raised by the Mobil offer (*id.*, Item 4(b)(vii));
>
> (4) That, although the Board believed it was an inopportune time to sell the Company and that independence was preferable (Item 4(b)(iv)), it had resolved "to explore and investigate, with the assistance and advice of First Boston," certain "possible transactions, including, without limitation, repurchases of Company Common Shares, the public or private sale of equity or other securities of the Company, *a business combination between the Company and another company, the acquisition of a significant interest in or the entire Company or of one or more of its significant business segments by another company,* a joint venture between the Company and one or more other companies, the acquisition by the Company of all or part of the business of another company, a complete or partial liquidation of the Company or the declaration of an extraordinary dividend." (*id.*, Item 7);[3] and

3. Emphasis has been added to quotations here and throughout this Brief, except where otherwise noted.

(5) That, with respect to the transactions to be explored by Marathon, there could "be no assurance that these activities will result in any transaction being recommended to the Board of Directors or that any transaction which is recommended will be authorized or consummated," that the Board's future activities with respect to any transaction "may be dependent upon Mobil's future actions with respect to the Mobil offer," and that the Board had adopted a "resolution with respect to the *need for confidentiality with respect to the parties to, and possible terms of, any transactions or proposals of the type referred to in the preceding portion of this Item 7(a) during negotiations with respect to any such transactions.*" (*Id.*).

2. *Marathon's Actions Following The Mobil Offer*

As announced in its Schedule 14D-9, Marathon filed an action under the antitrust laws against Mobil on November 1, 1981. That action was proceeding during the events at issue in this case. Hearings on Marathon's motion for a preliminary injunction began on November 17, 1981; a preliminary injunction was granted on November 30, 1981 and affirmed by the Sixth Circuit on December 23, 1981; review by this Court was denied. *Marathon Oil Co.* v. *Mobil Corp.*, 530 F. Supp. 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

Consistent with the disclosures in its Schedule 14D-9, Marathon began immediately to explore alternatives to the Mobil offer, including, *inter alia*, "a business combination with another company." With First Boston's assistance, Marathon made contacts with approximately 35 companies.

Representatives of Marathon first met with representatives of United States Steel Corporation ("U.S. Steel") on November 10, 1981. Negotiations respecting

a possible business combination between the two companies continued at various times until November 19, 1981.

During the same period in which it was negotiating with U.S. Steel, Marathon was also engaged in discussions with Gulf Oil Corporation ("Gulf") and Allied Industries, Inc. ("Allied") respecting a possible business combination with each of those companies.

3. *U.S. Steel's Offer*

On November 18, 1981, U.S. Steel's Board authorized its Chairman, David Roderick, to make an offer to Marathon to acquire the Company through a tender offer and subsequent merger. Later that day, Mr. Roderick communicated U.S. Steel's offer by telephone to a meeting of Marathon's Board. After receiving U.S. Steel's offer, the Marathon Board considered a number of alternatives, including tentative, indefinite proposals which had been received from Gulf and Allied, and then voted to accept U.S. Steel's offer. Both the communication of U.S. Steel's offer and the Marathon Board's vote to accept it took place after the stock markets had closed on November 18, 1981.

After the Marathon Board's acceptance had been communicated to U.S. Steel, representatives of the two companies negotiated and drafted an Agreement of Merger during the evening of November 18 and the morning of November 19, 1981. The Agreement was signed, and the proposed transaction was announced publicly on November 19, 1981.

U.S. Steel offered to purchase 30 million shares of Marathon stock (about 51%) for $125 per share in cash and to exchange each of the remaining shares in a merger for a $100 principal amount, 12-year, 12½%, guaranteed Note, then valued at approximately $86. Thus, as of No-

vember 18, 1981, the "blended" value of the U.S. Steel offer was approximately $106 per share.[4]

4. *Petitioner's Sale Of His 50 Shares Of Marathon Stock*

Petitioner alleged in his Second Amended Complaint that he sold his 50 shares of Marathon stock in the open market on November 18, 1981. He claims to have received $78 per share, for an estimated profit of about $29 per share over the average price on the day he bought those shares. Why he chose to sell on that particular day is not explained.

Starkman does not dispute, however, that prior to his sale of 50 shares for $78 per share, he had received Marathon's communication advising him, *inter alia*, that the Board and First Boston had determined Mobil's offer of $85 per share for 40 million shares to be "grossly inadequate" and that the Board was actively pursuing alternatives to the Mobil offer.

B. The Proceedings Below

In the action which he filed on December 31, 1981 and which was transferred to the District Court for the Southern District of Ohio, Petitioner claimed that Respondents had violated § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "1934 Act"), and Rule 10b-5 thereunder,[5] committed "common law fraud," and breached

4. (51% x $125) + (49% x $86) = $105.89. U.S. Steel's offer was ultimately accepted by the vast majority of Marathon's shareholders. *See Radol* v. *Thomas*, 556 F. Supp. 586 (S.D. Ohio 1983), *aff'd*, 772 F.2d 244 (6th Cir. 1985), *pet. for cert. filed*, No. 85-1030 (Dec. 13, 1985).

5. Inasmuch as the wrongs alleged to have been committed by Respondents were "in connection with a tender offer," Petitioner's claims should more properly have been stated under § 14(e) of the 1934 Act, 15 U.S.C. § 78n(e). *See generally Schreiber* v. *Burlington Northern, Inc.*, —— U.S. ——, 105 S.Ct. 2458, 86 L. Ed. 2d 11 (1985); *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977).

their fiduciary duties by failing to disclose certain speculative projections of asset values, forecasted earnings, and the fact that Marathon was negotiating with U.S. Steel with respect to a possible business combination between the two companies.

This case was originally consolidated with some 13 other actions against Marathon, U.S. Steel, and certain of their officers and directors pending in the Southern District of Ohio before Chief Judge Carl B. Rubin and captioned *Radol, et al.* v. *Thomas, et al.*, Civil Action No. C-1-82-13 (S.D. Ohio). The *Radol* case was tried to a jury between May 23 and June 21, 1983. The judgment entered on the defense verdict in *Radol* was affirmed by the Sixth Circuit (772 F.2d 244), and a petition for certiorari seeking review of that decision is pending before this Court (No. 85-1030). Prior to the trial, Judge Rubin granted Petitioner's motion to sever this case from *Radol*.

On February 8, 1984, Chief Judge Rubin granted summary judgment dismissing all of Petitioner's claims. The Sixth Circuit affirmed. 772 F.2d 231. Petitioner seeks review in this Court of only the portions of the decisions below which held that Respondents' disclosures respecting the pending negotiations with U.S. Steel were fully in accordance with federal law.

II.

Summary of Argument

This case involves none of the factors listed in Rule 17 which would justify the exercise of this Court's discretion to grant the writ of certiorari. The decision of the District Court, affirmed by the Court of Appeals, involved the application of a settled principle of law established by numerous prior decisions and embodied in an applicable regulation of the SEC.

Respondent Marathon was the target of a hostile tender offer. In its public response, pursuant to an express regulation of the SEC, Marathon disclosed that it was considering a number of alternatives, including a possible merger. It made contacts with numerous companies and held discussions concerning a possible merger with at least three companies. It did not disclose the identity of those with whom it had such discussions or the details thereof until it had reached an agreement for a merger with U.S. Steel.

Relying upon the applicable SEC regulations and numerous prior decisions, the courts below held that the participants in, and details of, preliminary negotiations involving a possible merger of a publicly-held corporation need not be disclosed unless and until an agreement in principle has been reached. The established rule is soundly based upon the policy of protecting investors from the potentially misleading, premature disclosure of merger negotiations, which frequently do not result in agreement. The rule also fosters freedom of negotiation by tender offer targets.

The entry of summary judgment was appropriate in this case, where there was no factual dispute and it was clear as a matter of law that Respondents' disclosures had been fully in accord with the governing principles of federal securities law. This Court did not, as Petitioner suggests, read Rule 56 out of the Federal Rules of Civil Procedure in securities cases when it decided *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976).

III.

Reasons For Denying The Writ

A. The Decision Below Is Supported By Applicable SEC Regulations And A Consistent Line Of Decisions Holding That Preliminary Merger Negotiations Need Be Disclosed Only If And When An Agreement In Principle Has Been Reached.

The District Court and the Sixth Circuit both held that Respondents' disclosures of Marathon's efforts to develop an alternative to the Mobil Offer complied fully with the requirements of federal law. Petitioner acknowledges that Item 7(a) of Marathon's Schedule 14D-9 disclosed that the Board had resolved to explore and investigate:

> "certain types of possible transactions, including, without limitation . . . a *business combination between the Company and another company, the acquisition of a significant interest in or the entire Company* or of one or more of its significant business segments *by another company* . . . ."

Petitioner does not deny that that disclosure was true (*i.e.*, that the Board did so resolve) or that Marathon did undertake such investigations. Instead, he contends that the disclosure was inadequate and violated federal law, because Marathon did not disclose that it was negotiating with *U.S. Steel* until the two companies had reached agreement on the terms of their business combination.

1. *Respondents' Disclosures Were Expressly Authorized By Applicable SEC Rules.*

Petitioner's contention is contrary to SEC Rules 14d-9 and 14e-2, 17 C.F.R. §§ 240.14d-9 and 240.14e-2, which govern the disclosure obligations of a tender offer target.

Those rules require a target company, such as Marathon, to disclose the items specified in Schedule 14D-9, 17 C.F.R. § 240.14d-101. Item 7 of Schedule 14D-9, in turn, requires disclosure of negotiations by the target which would result in an extraordinary transaction, such as a tender offer or merger, but the SEC's Instruction to Item 7 explicitly provides:[6]

> "*If no agreement in principle has yet been reached, the possible terms of any transaction or the parties thereto need not be disclosed* if in the opinion of the Board of Directors of the subject company such disclosure would jeopardize continuation of such negotiations. *In such event, disclosure that negotiations are being undertaken* or are underway and are in the preliminary stages *will be sufficient.*"

Pursuant to the SEC's Instruction, Marathon disclosed that exploratory negotiations were "being undertaken" and, further, disclosed in Item 7(a) of its Schedule 14D-9 that:

> "At its October 31, 1981 meeting, the Board of Directors adopted a resolution with respect to the need for confidentiality with respect to the parties to, and possible terms of, any transactions or proposals of the types referred to in the preceding portion of this Item 7(a) during negotiations with respect to any such transactions."

Marathon's disclosure in its Schedule 14D-9 that it was exploring a variety of alternatives, including undertaking

6. It is well established that the specific disclosure requirements imposed by SEC Rules 14d-9 and 14e-2 are the *only* disclosure requirements imposed upon a tender offer target. *Radol* v. *Thomas*, 772 F.2d 244, 254-55 (6th Cir. 1985), *pet. for cert. filed*, No. 85-1030 (Dec. 13, 1985); *Corenco Corp.* v. *Schiavone & Sons, Inc.*, 488 F.2d 207, 218 (2d Cir. 1973); *In re Transocean Tender Offer Securities Litigation*, 427 F. Supp. 1211 (N.D. Ill. 1977). *See Gulf Corp.* v. *Mesa Petroleum Co.*, 582 F. Supp. 1110, 1116 (D. Del. 1984).

negotiations for a possible business combination, and of the Board's determination of the need for confidentiality "with respect to [illegible]es to, and possible terms of, any transactions or proposals" were thus squarely within the terms of the SEC's requirements. Section 23(a)(1) of the 1934 Act, 15 U.S.C. § 78w(a)(1), expressly provides that no liability can be imposed under that Act for:

> "[A]ny act done or omitted in good faith in conformity with a rule, regulation, or Order of the Commission . . . notwithstanding that such rule, regulation, or Order may thereafter be amended or rescinded or determined by judicial or other authority to be invalid for any reason."

2. *The Decisions Below Are Amply Supported By Prior Precedent.*

Even absent the specific SEC Instruction with which Respondents complied, however, Petitioner's claim would be deficient as a matter of law under the long line of decisions which have consistently refused to require disclosure of the participants in, or terms of, pending negotiations respecting a possible merger of a publicly-traded corporation, unless and until an agreement in principle has been reached. The Sixth Circuit recognized that its affirmance of summary judgment against Petitioner's merger disclosure claim was amply supported by prior precedent (772 F.2d at 243):

> "The SEC and the courts have enunciated a firm rule regarding a tender offer target's duty to disclose ongoing negotiations: so long as merger or acquisition discussions are preliminary, general disclosure of the fact that such alternatives are being considered will suffice to adequately inform shareholders; a duty to disclose the possible terms of any transaction and the parties thereto arises only after an agreement in prin-

ciple, regarding such fundamental terms as price and structure, has been reached. *See* Item 7 of Schedule 14D-9, 17 C.F.R. § 240.14d-101 (1984); *Greenfield* v. *Heublein, Inc.*, 742 F.2d 751, 756-57 (3d Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 1189, 84 L.Ed.2d 336 (1985) (rejecting an 'intent to merge' trigger standard); *Staffin* v. *Greenberg*, 672 F.2d 1196, 1207 (3d Cir. 1982); *Reiss* v. *Pan American World Airways, Inc.*, 711 F.2d 11, 14 (2d Cir. 1983)."

Accord, *Missouri Portland Cement Co.* v. *H.K. Porter Co.*, 535 F.2d 388, 397-98 (8th Cir. 1976); *Susquehanna Corp.* v. *Pan American Sulphur Co.*, 423 F.2d 1075, 1084-86 (5th Cir. 1970); *Levinson* v. *Basic, Inc.*, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,801 (N.D. Ohio 1984), *appeal pending*, No. 84-3730 (6th Cir.); *Bucher* v. *Shumway*, [1979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,142 (S.D. N.Y. 1979), *aff'd mem.*, 622 F.2d 572 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Crane Co.* v. *Anaconda Co.*, 411 F. Supp. 1208, 1210 (S.D.N.Y. 1975); *Scott* v. *Multi-Amp Corp.*, 386 F. Supp. 44, 65 (D.N.J. 1974). *See also James Blackstone Memorial Library Association* v. *Gulf, M. & O. R. Co.*, 264 F.2d 445, 450-51 (7th Cir.), *cert. denied*, 361 U.S. 815 (1959) (pending negotiations for sale of corporate asset need not be disclosed to seller of shares); *Revlon, Inc.* v. *Pantry Pride, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,348 (D. Del. 1985) (by analogy to rule applicable to merger disclosures, tender offer need not be disclosed until terms of the offer are set and bidder has decided to go forward).

The foregoing authorities show the inaccuracy of Petitioner's assertion (Pet. 19) that the rule applied by the Sixth Circuit in this case is "wholly without precedent." Indeed, Petitioner cites no cases which contradict the established principle that the detail concerning preliminary merger negotiations involving a publicly-held corporation

need not be disclosed unless and until an "agreement in principle" has been reached.[7]

Petitioner asserts (Pet. 14n.) that the "SEC has expressed the opinion that *Greenfield* [v. *Heublein, Inc., supra*, 742 F.2d 751] was wrongly decided," citing *In re Carnation Co.*, Exchange Act Rel. No. 22214, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,801 (July 8, 1985). To the extent that Petitioner suggests that the SEC expressed disagreement in *Carnation* with the rule defining when a duty to disclose merger negotiations arises, the footnote is erroneous and misleading. In *Carnation*, the SEC held that it was false and misleading for an issuer to respond to an inquiry regarding a rise in its stock price by stating that it knew of no reason for the rise and was not in merger negotiations, when in fact it was in merger negotiations. As the Sixth Circuit noted (772 F.2d at 243 n.9), the SEC in *Carnation* disagreed with the *Greenfield* decision on that issue alone. (*Id.*, p. 87,596 n.8). *Carnation* does not, however, address the issue of

7. The courts have fashioned certain, limited exceptions to the rule against disclosure of preliminary merger negotiations, none of which is relevant to the instant case. Most recently, in *Michaels* v. *Michaels*, 767 F.2d 1185, 1195-98 (7th Cir. 1985), *pet. for cert. filed*, No. 85-752 (Nov. 1, 1985), the Seventh Circuit recognized the general rule against disclosure of preliminary negotiations involving a publicly-traded company but held that it does not apply in the context of a purchase of stock from one of three shareholders in a close corporation, because the consideration of protecting the market and public shareholders from premature disclosure does not apply. *See also SEC* v. *Geon Indus., Inc.*, 531 F.2d 39, 46-48 (2d Cir. 1976) (Insider who "tipped" pending merger negotiations violated § 10(b), even though negotiations were too tentative to be disclosed publicly); *Thomas* v. *Duralite Co.*, 524 F.2d 577, 584-85 (3d Cir. 1975) (Where, prior to purchasing shares in a close corporation, buyer misrepresented financial health of corporation and postponed negotiations for a likely merger to avoid disclosure to seller, liability was imposed under § 10(b)); *Levin* v. *Marder*, 343 F. Supp. 1050 (W.D. Pa. 1972) (refusing to grant summary judgment in favor of insider who bought shares in close corporation without disclosing favorable merger proposal; to the extent decision goes beyond close corporation context, it is overruled by later Third Circuit decisions in *Staffin* and *Greenfield*).

when a tender offer target which discloses that it is considering undertaking merger negotiations must disclose the identity of potential merger partners, the prices being considered, or other details of its negotiations—and that is the only issue which Petitioner seeks to have reviewed in this case. As to that issue, the SEC's position has been stated in its Instructions to Schedule 14D-9, which is discussed above and with which Respondents complied.

3. *The Established Rule Governing Disclosure Of Pending Merger Negotiations Is Premised Upon Sound Policy.*

As the Sixth Circuit explained in its decision below, the established rule governing disclosure of preliminary merger negotiations is premised upon a policy of protecting public shareholders and the marketplace from potentially misleading information (772 F.2d at 243):

> "The rationale emerging from these cases is that when dealing with complex bargaining which may fail as well as succeed and which may succeed on terms which vary greatly from those originally anticipated, the disclosure of preliminary discussions could very easily mislead shareholders as to the prospects of success, and by making public an impending offer, push the price of the target's stock toward the expected tender price, thereby depriving shareholders of the primary inducement to tender—a premium above market price—and forcing the offeror to abandon its plan or greatly increasing the cost of the offer. *See Staffin* v. *Greenberg*, 672 F.2d at 1207."

Accord, Michaels v. *Michaels, supra*, 767 F.2d at 1196 ("[T]o avoid any misleading caused by disclosing that a company is discussing merger possibilities, both the Third Circuit and a panel of the Second Circuit have held that the existence of preliminary merger negotiations is immaterial as a matter of law. . . . [F]or publicly-traded stock,

the shareholders' right to know outweighs the need to protect them from potentially misleading disclosures only when the negotiating parties have reached agreement on price and structure."); *Reiss* v. *Pan American World Airways, Inc.*, 711 F.2d 11, 14 (2d Cir. 1983) ("Such negotiations are inherently fluid and the eventual outcome is shrouded in uncertainty. Disclosure may in fact be more misleading than secrecy so far as investment decisions are concerned."); *Greenfield* v. *Heublein, Inc.*, 742 F.2d 751, 756 (3d Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 1189, 84 L.Ed. 2d 336 (1985) ("We reasoned that because disclosure of such tentative discussions may itself be misleading to shareholders, preliminary merger discussions are immaterial as a matter of law. . . . Thus, we further held that '[w]here an agreement in principle [to merge] has been reached, a duty to disclose *does* exist.' *Staffin*, 672 F.2d at 1207.") (emphasis in original).

The policy underlying the established rule followed by the SEC and the courts is sound. Indeed, although Petitioner seeks review of the Sixth Circuit's decision, he suggests no feasible alternative to the rule applied below.

The established disclosure rule applied by the Sixth Circuit in this case provides a practical and certain guideline for disclosure by target companies. That rule recognizes the realities of the business world. It provides shareholders with information on the target's activities but does not force disclosure of information which is inherently speculative and could well be misleading to shareholders and the marketplace. Further, it does not hamper unnecessarily the efforts of target companies to develop alternatives to inadequate tender offers, which, in turn, benefits shareholders.

Petitioner's claims that he was "deceived" into selling his shares by any actions of Respondents were properly rejected by the courts below. In the first place, Petitioner sold his shares for a price which was $7 per share lower

than the $85 Mobil offer which Marathon's Board and First Boston had determined to be "grossly inadequate." Secondly, Petitioner's claims of "concealment . . . of Marathon's efforts to find a white knight" (Pet. 21) are belied by Marathon's disclosures of its consideration of numerous alternatives, including a "business combination with another company."[8] Petitioner evidently had no faith in Marathon's ability to develop an alternative to Mobil's offer and chose to sell his shares before Respondents' efforts bore fruit in the Merger Agreement with U.S. Steel. His decision turned out to be unwise, but it is not, and should not be, actionable under the federal securities laws.

B. The Established Rule Governing Disclosure Of Merger Negotiations Is Fully Consistent With This Court's Decision In *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976).

Faced with the overwhelming precedent supporting the decisions below, Petitioner argues that the established rule governing disclosure of merger negotiations is inconsistent with this Court's decision in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976). In *TSC Industries*, this Court developed an objective test for the "materiality" of facts under the federal securities laws. (*Id.* at 449). It also held that the question of materiality is a "mixed question of law and fact" and that assessments of such questions are (*id.* at 450) (citations omitted):

8. Equally unfounded is Petitioner's claim that he relied upon Marathon's statements that it wished to remain independent. As the District Court and the Sixth Circuit (772 F.2d at 243) held, those statements "were not misleading when read in their full context, and at most expressed a sincere hope which the board found unrealistic under the pressure of Mobil's offer." Independence clearly was preferable to the only alternative available when the statements were made—Mobil's "grossly inadequate" tender offer. In the same document, however, Marathon disclosed that its Board had resolved to explore a number of alternatives to the Mobil offer, some of which clearly entailed loss of Marathon's independence.

> "peculiarly ones for the trier of fact. Only if the established omissions are so 'obviously important to an investor that reasonable minds cannot differ on the question of materiality' is the ultimate issue of materiality appropriately resolved 'as a matter of law' by summary judgment."

Contrary to the manner in which Petitioner seeks to read the *TSC Industries* decision, this Court did not foreclose the use of summary judgment under Fed. R. Civ. Pro. 56 in securities cases, as the above quotation confirms.[9] To the contrary, this Court expressly recognized in *TSC Industries* that "[s]ome information is of such dubious significance that insistence on its disclosure may accomplish more harm than good." (*Id.* at 448). Where, as in this instance, the agency charged with enforcing federal securities laws and with prescribing rules for the protection of investors in tender offers[10] and the lower courts have consistently held that premature disclosure of merger negotiations is of such dubious significance and holds such great potential to mislead investors that disclosure should not be required as a matter of law, the imposition of summary judgment is entirely appropriate[11] The collective

9. In *TSC Industries,* this Court provided two specific examples of the appropriateness of summary judgment in securities cases. At pp. 453-54 n.15, this Court suggested that: "If, for example, the proxy statement in this case had failed to reveal National's 34% stock interest in TSC . . . these omissions would have rendered the statement materially misleading as a matter of law . . . ." This Court also found that "it cannot have been materially misleading to fail to disclose" certain stock purchases, in the absence of an improper, manipulative purpose. *Id.* at 463.

10. § 14(d)(4) of the 1934 Act, 15 U.S.C. § 78n(d)(4) authorizes the SEC to prescribe rules and regulations respecting "[a]ny solicitation or recommendation . . . to accept or reject a tender offer . . . as necessary or appropriate in the public interest or for the protection of investors."

11. In accordance with the strictures of *TSC Industries, Inc.*, the lower courts have granted summary judgment in those cases.

(footnote continued on next page)

experience in this area has confirmed the soundness of the established rule that the details of negotiations concerning the possible merger of a publicly-held corporation, prior to an agreement in principle, are not material as a matter of law and need not be disclosed.

Because the undisputed facts of record established that Respondents' disclosures in response to the Mobil offer compiled in all respects with the 1934 Act, the court below was entirely justified in affirming summary judgment against Petitioner.

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such as this one, where it was clear as a matter of law that omitted information was not material. *See, e.g., Caravan Mobile Home Sales, Inc.* v. *Lehman Brothers Kuhn Loeb, Inc.*, 769 F.2d 561 (9th Cir. 1985); *Berg* v. *First American Bankshares, Inc.*, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,011 (D.D.C. 1985); *Klausner* v. *Ferro*, 604 F. Supp. 1188 (E.D.N.Y. 1985); *Freschi* v. *Grand Coal Venture*, 583 F. Supp. 780 (S.D.N.Y. 1984).

IV.

Conclusion

The decisions below applied sound and established precedent in a manner consistent with the federal securities laws and this Court's prior decisions. None of the considerations governing the exercise of this Court's discretion to grant the writ of certiorari set forth in Rule 17 is presented in this case.

Accordingly, for the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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Dated: January 15, 1986.

APPENDIX

§ 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 14(d)(4) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(d)(4)

Recommendations Regarding Acceptance or Rejection of Tender Offer

Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e)

Untrue statement of material fact or omisison of fact with respect to tender offer

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

§ 23(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78w(a)(1)

Rules, regulations, and orders; annual reports

(a) Power to make rules and regulations; considerations; public disclosure

(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 78c(a)(34) of this title shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe

greater, lesser, or different requirements for different classes thereof. No provision of this chapter imposing any liability shall apply to any act done or omitted in good faith in conformity with a rule, regulation, or order of the Commission, the Board of Governors of the Federal Reserve System, other agency enumerated in section 78c (a)(34) of this title, any self-regulatory organization, notwithstanding that such rule, regulation, or order may thereafter be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

SEC Rule 10b-5, 17 C.F.R. § 240.10b-5

Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

SEC Rule 14d-9, 17 C.F.R. § 240.14d-9

Solicitation/Recommendation Statements with Respect to Certain Tender Offers

(a) *Filing and transmittal of recommendation statement.* No solicitation or recommendation to security holders shall be made by any person described in paragraph (d) of this section with respect to a tender offer for such securities unless as soon as practicable on the date such solicitation or recommendation is first published or sent or given to security holders such person complies with the following subparagraphs.

(1) Such person shall file with the Commission eight copies of a Tender Offer Solicitation/Recommendation Statement on Schedule 14D-9 (240.14d-101), including all exhibits thereto; and

(2) If such person is either the subject company or an affiliate of the subject company,

(i) Such person shall hand deliver a copy of the Schedule 14D-9 to the bidder at its principal office or at the address of the person authorized to receive notices and communications (which is set forth on the cover sheet of the bidder's Schedule 14D-1 (§ 240.14d-100) filed with the Commission; and

(ii) Such person shall give telephonic notice (which notice to the extent possible shall be given prior to the opening of the market) of the information required by Items 2 and 4(a) of Schedule 14D-9 and shall mail a copy of the Schedule to each national securities exchange where the class of securities is registered and listed for trading and, if the class is authorized for quotation in the NASDAQ interdealer quotation system, to the National Association of Securities Dealers, Inc. ("NASD").

(3) If such person is neither the subject company nor an affiliate of the subject company,

(i) Such person shall mail a copy of the schedule to the bidder at its principal office or at the address of the person authorized to receive notices and communications (which is set forth on the cover sheet of the bidder's Schedule 14D-1 (§ 240.14d-100) filed with the Commission); and

(ii) Such person shall mail a copy of the Schedule to the subject company at its principal office.

(b) *Amendments.* If any material change occurs in the information set forth in the Schedule 14D-9 (§ 240.14d-101) required by this section, the person who filed such Schedule 14D-9 shall:

(1) File with the Commission eight copies of an amendment on Schedule 14D-9 (§ 240.14d-101) disclosing such change promptly, but not later than the date such material is first published, sent or given to security holders; and

(2) Promptly deliver copies and give notice of the amendment in the same manner as that specified in paragraph (a)(2) or paragraph (a)(3) of this section, whichever is applicable; and

(3) Promptly disclose and disseminate such change in a manner reasonably designed to inform security holders of such change.

(c) *Information required in solicitation or recommendation.* Any solicitation or recommendation to holders of a class of securities referred to in section 14(d)(1) of the Act with respect to a tender offer for such securities shall include the name of the person making such solicitation or recommendation and the information required by Items 1, 2, 3(b), 4, 6, 7 and 8 of Schedule 14D-9 (§ 240.14d-101) or a fair and adequate summary thereof: *Provided, how-*

ever, That such solicitation or recommendation may omit any of such information previously furnished to security holders of such class of securities by such person with respect to such tender offer.

(d) *Applicability.*

(1) Except as is provided in paragraphs (d)(2) and (e) of this section, this section shall only apply to the following persons:

(i) The subject company, any director, officer, employee, affiliate or subsidiary of the subject company;

(ii) Any record holder or beneficial owner of any security issued by the subject company, by the bidder, or by any affiliate of either the subject company or the bidder; and

(iii) Any person who makes a solicitation or recommendation to security holders on behalf of any of the foregoing or on behalf of the bidder other than by means of a solicitation or recommendation to security holders which has been filed with the Commission pursuant to this section or Rule 14d-3 (§ 240.14d-3).

(2) Notwithstanding paragraph (d)(1) of this section, this section shall not apply to the following persons:

(i) A bidder who has filed a Schedule 14D-1 (§ 240.14d-101) pursuant to Rule 14d-3 (§ 240.14d-3);

(ii) Attorneys, banks, brokers, fiduciaries or investment advisers who are not participating in a tender offer in more than a ministerial capacity and who furnish information and/or advice regarding such tender offer to their customers or clients on the unsolicited request of such customers or clients or solely pursuant to a contract or a relationship providing for advice to the customer or client to whom the information and/or advice is given.

(e) *Stop-look-and-listen communication.* This section shall not apply to the subject company with respect to a communication by the subject company to its security holders which only:

(1) Identifies the tender offer by the bidder;

(2) States that such tender offer is under consideration by the subject company's board of directors and/or management;

(3) States that on or before a specified date (which shall be no later than 10 business days from the date of commencement of such tender offer) the subject company will advise such security holders of (i) whether the subject company recommends acceptance or rejection of such tender offer; expresses no opinion and remains neutral toward such tender offer; or is unable to take a position with respect to such tender offer and (ii) the reason(s) for the position taken by the subject company with respect to the tender offer (including the inability to take a position); and

(4) Requests such security holders to defer making a determination whether to accept or reject such tender offer until they have been advised of the subject company's position with respect thereto pursuant to paragraph (e)(3) of this section.

(f) *Statement of management's position.* A statement by the subject company of its position with respect to a tender offer which is required to be published or sent or given to security holders pursuant to Rule 14e-2 shall be deemed to constitute a solicitation or recommendation within the meaning of this section and section 14(d)(4) of the Act.

SEC Rule 14e-2, 17 C.F.R. § 240.14e-2

Position of Subject Company with Respect to a Tender Offer

(a) *Position of subject company.* As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, the subject company, no later than 10 business days from the date the tender offer is first published or sent or given, shall publish, send or give to security holders a statement disclosing that the subject company:

(1) Recommends acceptance or rejection of the bidder's tender offer;

(2) Expresses no opinion and is remaining neutral toward the bidder's tender offer; or

(3) Is unable to take a position with respect to the bidder's tender offer.

Such statement shall also include the reason(s) for the position (including the inability to take a position) disclosed therein.

(b) *Material change.* If any material change occurs in the disclosure required by paragraph (a) of this section, the subject company shall promptly publish, send or give a statement disclosing such material change to security holders.

SEC Schedule 14D-9, 17 C.F.R. § 14d-101

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

SCHEDULE 14D-9

Solicitation/Recommendation Statement Pursuant to Section 14(d)(4) of the Securities Exchange Act of 1934

(Amendment No.)

(Name of Subject Company)

(Name of Person(s) Filing Statement)

(Title of Class of Securities)

(CUSIP Number of Class of Securities)

(Name, address and telephone number of person authorized to receive notice and communications on behalf of the person(s) filing statement)

Instructions: Eight copies of this statement, including all exhibits, should be filed with the Commission.

General Instructions: A. The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the items shall be so prepared as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative so state.

B. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item or sub-item of the statement unless it would render such answer misleading, incomplete, unclear or confusing. Material incorporated by reference shall be clearly identified in the reference by page, paragraph, caption or otherwise. An express statement that the specified matter is incorporated by reference shall be made at the particular place in the statement where the information is required. A copy of any information or a copy of the pertinent pages of a document containing such information which is incorporated by reference shall be submitted with this statement as an exhibit and shall be deemed to be filed with the Commission for all purposes of the Act.

ITEM 1. SECURITY AND SUBJECT COMPANY

State the title of the class of equity securities to which this statement relates and the name and the address of the principal executive offices of the subject company.

ITEM 2. TENDER OFFER OF THE BIDDER

Identify the tender offer to which this statement relates, the name of the bidder and the address of its principal executive offices or, if the bidder is a natural person, the bidder's residence or business address (which may be based on the bidder's Schedule 14D-1 [§ 240.14d-100] filed with the Commission).

ITEM 3. IDENTITY AND BACKGROUND

(a) State the name and business address of the person filing this statement.

(b) If material, describe any contract, agreement, arrangement or understanding and any actual or potential conflict of interest between the person filing this statement or its affiliates and: (1) the subject company, its executive officers, directors or affiliates; or (2) the bidder, its executive officers, directors or affiliates.

Instruction: If the person filing this statement is the subject company and if the materiality requirement of Item 3(b) is applicable to any contract, agreement, arrangement or understanding between the subject company or any affiliate of the subject company and any executive officer or director of the subject company, it shall not be necessary to include a description thereof in this statement, or in any solicitation or recommendation published, sent or given to security holders if such information, or information which does not differ materially from such information, has been disclosed in any proxy statement, report or other communication sent within one year of the filing date of this statement by the subject company to the then holders of the securities and has been filed with the Commission: *Provided* That this statement and the solicitation or recommendation published, sent or given to security holders shall contain specific reference to such proxy statement, report or other communication and that a copy of the pertinent portion(s) thereof is filed as an exhibit to this statement.

ITEM 4. THE SOLICITATION OR RECOMMENDATION

(a) State the nature of the solicitation or the recommendation. If this statement relates to a recommendation, state whether the person filing this statement is advising security holders of the securities being sought by the bidder to accept or reject the tender offer or to take other action with respect to the tender offer and, if so, furnish a description of such other action being recommended. If the person filing this statement is the subject company and a recommendation is not being made, state whether the subject company is either expressing no opinion and is remaining neutral toward the tender offer or is unable to take a position with respect to the tender offer.

(b) State the reason(s) for the position (including the inability to take a position) stated in (a) of this Item.

Instruction: Conclusory statements such as "The tender offer is in the best interest of shareholders," will not be considered sufficient disclosure in response to Item 4(b).

ITEM 5. PERSONS RETAINED, EMPLOYED OR TO BE COMPENSATED

Identify any person or class of persons employed, retained or to be compensated by the person filing this statement or by any person on its behalf, to make solicitations or recommendations to security holders and describe briefly the terms of such employment, retainer or arrangement for compensation.

ITEM 6. RECENT TRANSACTIONS AND INTENT WITH RESPECT TO SECURITIES

(a) Describe any transaction in the securities referred to in Item 1 which was effected during the past 60 days by the person(s) named in response to Item 3(a) and by any executive officer, director, affiliate or subsidiary of such person(s).

(b) To the extent known by the person filing this statement, state whether the persons referred to in Item 6(a) presently intend to tender to the bidder, sell or hold securities of the class of securities being sought by the bidder which are held of record or beneficially owned by such persons.

ITEM 7. CERTAIN NEGOTIATIONS AND TRANSACTIONS BY THE SUBJECT COMPANY

(a) If the person filing this statement is the subject company, state whether or not any negotiation is being undertaken or is underway by the subject company in response to the tender offer which relates to or would result in:

(1) An extraordinary transaction such as a merger or reorganization, involving the subject company or any subsidiary of the subject company;

(2) A purchase, sale or transfer of a material amount of assets by the subject company or any subsidiary of the subject company;

(3) A tender offer for or other acquisition of securities by or of the subject company; or

(4) Any material change in the present capitalization or dividend policy of the subject company.

Instruction: If no agreement in principle has yet been reached, the possible terms of any transaction or the parties thereto need not be disclosed if in the opinion of the Board of Directors of the subject company such disclosure would jeopardize continuation of such negotiations. In such event, disclosure that negotiations are being undertaken or are underway and are in the preliminary stages will be sufficient.

(b) Describe any transaction, board resolution, agreement in principle, or a signed contract in response to the tender offer, other than one described pursuant to Item 3(b) of this statement, which relates to or would result in one or more of the matters referred to in Item 7(a)(1), (2), (3) or (4).

ITEM 8. ADDITIONAL INFORMATION TO BE FURNISHED

Furnish such additional information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

ITEM 9. MATERIAL TO BE FILED AS EXHIBITS

Furnish a copy of:

(a) Any written solicitation or recommendation which is published or sent or given to security holders in connection with the solicitation or recommendation referred to in Item 4.

(b) If any oral solicitation or recommendation to security holders is to be made by or on behalf of the person filing this statement, any written instruction, or other material which is furnished to the persons making the actual oral solicitation or recommendation for their use, directly or indirectly, in connection with the solicitation or recommendation.

(c) Any contract, agreement, arrangement or understanding described in Item 3(b) or the pertinent portion(s) of any proxy statement, report or other communication referred to in Item 3(b).

Signature, After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

....

(Date) (Signature)

.....

(Name and Title)

Instruction: The original statement shall be signed by each person on whose behalf the statement is filed or his authorized representative. If the statement is signed on behalf of a person by his authorized representative (other than an executive officer of a corporation or a general partner of a partnership), evidence of the representative's authority to sign on behalf of such person shall be filed with the statement. The name and any title of each person who signs the statement shall be typed or printed beneath the signature.